Supreme Court of the United States

October Term, 1951

No. ——

BONDHOLDERS, INC., PETITIONER,

versus

LEGH R. POWELL, JR., and HENRY W. ANDERSON, AS RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY, and SEABOARD AIR LINE RAILROAD COMPANY, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable The Supreme Court of the United States:

Petitioner, Bondholders, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on June 1, 1951.

OPINIONS BELOW

The order of the District Court (R. 1) is not reported. The opinion of the Court of Appeals for the Fourth Circuit (R. 275) is reported in 190 F. (2d) 74.

JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 1951 (R. 287). A petition for rehearing filed on June 30, 1951 (R. 288) was denied on July 11, 1951 (R. 292). The jurisdiction of this Court is invoked under 28 U. S. C., sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the receivership court has the right to treat a reorganization plan in equity as though it were a reorganization plan under the Bankruptcy statutes, making it inflexible after the date of consummation, and therefore refusing distribution of any part of unexpected additional assets coming into the hands of the receivers to creditors not included in distribution of securities in the original plan of reorganization?

2. Whether proceeds from sale of additional assets acquired by debtor railroad while operating in equity receivership should be distributed to unsatisfied creditors on a basis consistent with the Plan of Reorganization, where such assets were not sold in the original judicial sale consummating the reorganization but were reserved for the receivership estate?

3. Whether in a railroad reorganization in equity, when an erroneous estimate of future earnings produces insufficient capitalization to include in satisfaction of claims certain creditors holding junior bonds, unexpected earnings of the debtor, expressly reserved for future distribution by the Court, may be distributed solely to senior bondholders whose claims have already been satisfied by receipt of new securities determined to be the "equitable equivalent" of the rights surrendered?

STATEMENT

The Seaboard Air Line Railway Company (hereinafter referred to as the Old Company) was placed in equity receivership on December 23, 1930, in the District Courts of the United States for the Eastern District of Virginia and the Southern District of Florida, and was operated in receivership until July 31, 1946, when substantially all its properties were delivered after judicial sale to the newly organized Seaboard Air Line Railroad Company (hereinafter referred to as the New Company), which has since operated the railroad.

The corporate structure of the Old Company was exceedingly complicated and adverse economic conditions prevented adoption of a practical reorganization plan until a special master was appointed in 1939. Finally, on July 20, 1943, his report with proposed plan was submitted, and approved with modifications on December 10, 1943; *Guaranty Trust Co. v. Seaboard Air Line Ry. Co.*, 53 F. Supp. 672, affirmed, *Badenhausen v. Guaranty Trust Co.*, 4 Cir., 145 F. (2d) 40.

The reorganization presented two main questions "(1) what could be a proper reduced capitalization for the reorganized company, and (2) what allocation of the new securities should be made among the numerous classes of secured creditors." (53 F. Supp. at p. 677.)

The capitalization of the New Company was fixed at $185,000,000.00 divided into general mortgage bonds, income mortgage bonds, preferred stock and common stock. In addition the New Company assumed payment of $11,870,000.00 of Receiver's Certificates, making a total capitalization of $196,870,000.00. That figure was arrived at by estimating the probable future earnings of the several lines comprising the railroad system, and was not based on the value of the mortgaged property. The probable future earn-

ings were predicted in 1943 at sufficient to cover fixed annual charges of $6,808,500.00 (53 F. Supp. at p. 679). That capitalization was subsequently approved by the Interstate Commerce Commission (257 I. C. C. 683, 257 I. C. C. 837) but not without comment that the capitalization was actually less than the cash value of the railroad property. (257 I. C. C. 696).

Contemporaneously the allocation of the securities of the New Company to the creditors of the Old Company was determined. There were ten underlying mortgages upon divisional lines of the system, and four general system mortgages, as well as receiver's obligations and other secured debts.[1] Those highest in priority secured by mortgages on the most profitable and valuable lines were fully paid. Securities were allocated to the others in accordance with formulas based on respective segregated earnings, freight business and value of plant of the separate divisions. In conformity with the expressions of this Court in the cases of *Ecker v. Western Pac. R. Corp.*, 318 U. S. 448, 63 S. Ct. 692, 87 L. Ed. 892; and *Group of Inst. Investors v. Chicago, M. St. P. & P. R. Co.*, 318 U. S. 523, 63 S. Ct. 727, 87 L. Ed. 959 (hereinafter referred to as the *Milwaukee case*), both the special master and the District Court adhered to the principle that "a prior lien must be fully and fairly compensated in value in what is received therefor in new securities before subordinate liens can participate" (53 F. Supp. 681). When the face value of a claim was equalled by the par value of new securities allocated to it, that claim was considered satisfied for the purpose of passing to the next claim; and the District Court modified the special master's proposed plan in those instances where it seemed that "excessive amounts of par

[1] The total secured indebtedness of the Seaboard, principal and interest, in the hands of the public at the time the plan was approved was $340,251,484.64 (53 F. Supp. 677).

value of new securities'' had been allocated to senior liens (53 F. Supp. at p. 689). When all securities had been allocated in accordance with the plan some 47% of the general system mortgage known as the Refunding mortgage was unsatisfied by par value of new securities, and there were no securities left to apply to the general mortgage known as the Adjustment mortgage, which constituted a lien immediately junior to the Refunding mortgage (53 F. Supp. at p. 680). The reason for this was the insufficient base of estimated annual income on which an insufficient amount of new securities were predicated. Unsecured claims and preferred and common stockholders were likewise eliminated from participation in the new securities.

To consummate the equity reorganization a judicial sale of the railroad properties was necessary. In order to provide a proportionate cash payment for creditors who refused to accept new securities, further hearings were held in 1945 and a cash value or upset price for the whole railroad property was fixed at $52,000,000.00. The cash share to be distributed to each lien was determined therefrom, *Guaranty Trust Co. v. Seaboard Air Line Ry. Co.*, 60 F. Supp. 607. In recognition of the insufficient estimate of future annual income and the resulting insufficiency of new securities, the decree on that sale reserved for future distribution all income earned between the date of that sale and such date as delivery might be made. (R. 188.) To complete the mechanics of consummating the reorganization, the creditors' Reorganization Committee entered into a Reorganization Agreement with the New Company on May 25, 1945, wherein the Committee agreed to purchase the railroad for the new company at the foreclosure sale and to transfer to the new company all property purchased by the Committee; to bid at all sales and to pay the purchase price as far as possible by the use of deposited bonds, de-

posited with the Committee by the holders under the various mortgages. The New Company agreed to pay the balance of the purchase price if any were needed, to assume certain liabilities of the insolvent, and to issue to the Reorganization Committee the new securities to be distributed under the plan. The sale was held May 31, 1945, and the properties transferred on July 31, 1946, the New Company then beginning operation. The new securities were delivered to the creditors' Reorganization Committee for distribution.

The receivership was not terminated, however, and the present controversy arose out of two subsequent judicial sales and transfers of assets to the New Company.

On March 28, 1947, Order 442A of the District Court directed the sale and transfer by the receivers to the Reorganization Committee, and through it to the New Company, of assets in the sum of $10,045,270.66, consisting of the earnings of the receivers in the operation of the Seaboard at their own risk between May 31, 1945, when the foreclosure sale took place, and July 31, 1946, when the settlement between the Old Company and the New Company took place in accordance with the plan. (R. 251.)

On October 25, 1950, Order 451A in substantially identical terms directed the sale and transfer of assets in the sum of $6,338,838.77, consisting of tax refunds resulting from carrying back losses in 1947 and 1950 on excess profits taxes paid by the receivers in 1943 and 1944. (R. 11.) All assets coming into the hands of the receivers after the original sale date had been specifically reserved to the receivership for the benefit of creditors. (R. 188.) 60 F. Supp. at p. 616.)

Meanwhile time had proved the originally predicted earning power of the railroad was grossly underestimated by the master, the district court and the Court of Appeals. Instead of $7,000,000.00 the annual earnings have averaged

$17,954,608.00 since 1941 and have never fallen under $10,357,631.00. (1947.)

Bondholders, Inc., a corporation whose stockholders are holders of a majority of the remaining outstanding bonds issued under the general system mortgage known as the Adjustment mortgage, made objection (in accordance with Notice Order 450) (R. 48) to the final sale and transfer under Order 451A, this $6,000,000.00 being all remaining assets in the hands of the receivers except a sum reserved for payment of final costs. (R. 3.) The grounds for the objection were: (1) no real consideration was being paid by the New Company for the fund to be transferred to it, (2) no further satisfaction was to be paid to creditors either in accordance with the plan or in any other manner, and (3) time had proved the Adjustment mortgage was inequitably eliminated from participation in the new securities in 1945 and should receive some payment from final assets which had been reserved for creditors. (R. 50.)

The proposed Order 451A, as in the case of Order 442A where $10,000,000.00 was transferred, provided that the $6,000,000.00 in cash assets was to be "paid" for by the use of deposited bonds held by the Reorganization Committee as far as possible, any excess to be paid by the New Company. The New Company also agreed to assume future adjudicated liabilities of the receivers declared payable by order of the court. (R. 30.) Your petitioner's objections were overruled (R. 79) and Order 451A signed October 25, 1950.

The Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court, filing its opinion on June 1, 1951. Its conclusions with reference to the objections made may be summarized as follows:

1. The $16,000,000.00 in funds transferred under Orders 442A and 451A were paid for "by crediting the

amount of the purchase upon the unpaid indebtedness of the Old Company represented by bonds on deposit with the Reorganization Committee and bonds in the hands of bondholders entitled to participate in the Plan who had failed to deposit their securities."[2]

2. To afford any portion of payment to claims not satisfied in the original distribution under the Plan would require a substantial modification of the Plan, which should not be done unless there is a showing of substantial injustice.

3. Holders of Adjustment bonds have not pursued their rights unceasingly throughout the years of litigation and cannot now complain; specifically since the Adjustment mortgage trustee did not participate in the receivership litigation, and no appeal was taken by appellant from Order 442A, under which the first $10,000,000.00 of additional assets was transferred.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that "crediting" purchase price on deposited bonds for which cash and new securities had already been issued was a sufficient consideration for the funds transferred, although no additional satisfaction is to be furnished creditors.

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[2] 190 F. (2d) 74, 78. "In each instance payment for the assets transferred was made by crediting the amount of the purchase price upon the unpaid indebtedness of the Old Company represented by bonds on deposit with the Reorganization Committee and bonds in the hands of bondholders entitled to participate in the Plan who had failed to deposit their securities. Appropriate amount representing the distributive share of each bond was endorsed on the deposited bonds or added to the amount to be paid in cash by the New Company to the non-assenting bondholders upon the final consummation of the Plan. In other words, the transfer of these assets was made and the purchase price was paid in the same way that the sale of the railroad property was made under the decree of foreclosure; and the share of the participating bondholders in the assets of the debtor was correspondingly increased."

2. In holding that bonds deposited, and for which cash and new securities have been issued of a par value equal to the face value of such claims, are not satisfied and may continue to be re-used for further "purchase" of debtor's assets without additional distribution to creditors.

3. In failing to require respondents to continue to apply to all creditors the equitable rule of satisfaction set up in the Plan, such that when each senior claim is satisfied by allocation of securities equalling the claim at par then satisfaction should be extended to the next most senior lien in order of priority.

4. In failing to require uniform treatment of all creditors on a basis consistent with the Plan, so that creditors should continue to be satisfied and receive distribution of the proceeds of the successive sales of the debtor's assets.

5. In holding that in a receivership proceeding in equity a claimant whose claim has been treated throughout, and which has been the subject of consideration, argument, and previous appeals, and which has not been previously satisfied because of insufficient assets, is barred from participation in new assets as they subsequently become available for payment of debts.

6. In holding that payment of wholly unsatisfied claims as new assets become available will require modification of the reorganization Plan.

7. In holding that bonds deposited in return for cash and new securities remain of force as against the debtor so as to prevent distribution of additional assets to other unsatisfied creditors.

8. In failing to recognize that the vast earnings of the New Company exceed the predicted earnings by such a wide margin that petitioner and other creditors were inequitably excluded from participation in new securities or cash payment, and in failing to require the receivership court to

direct distribution of the remaining assets of the debtor Old Company to previously unsatisfied creditors on a fair and equitable basis.

9. In failing to make any provisions whatever for the payment of unsatisfied lien creditors, including petitioner, although large sums reserved at the first sale to the receivers for the creditors are available for part payment.

10. In holding that setting up of new "distributive share" allowances for dissenting bondholders, who have not yet deposited their bonds but who may ask for the securities or cash distributive share reserved for them, constitutes any real consideration for the transfer of $6,000,000.00 of the debtor's assets.

11. In holding, in effect, that a bookkeeping transaction whereby credits are given on old bonds long since surrendered in exchange for new securities, and setting up a cash reserve of $300,000.00 to pay distributive shares for dissenters who may come in at this late date in the reorganization, constitutes adequate consideration in equity for the transfer of $6,000,000.00 of the debtor's assets.

12. In holding that some $22,500,000.00 in Adjustment bonds, called in by the old Seaboard in exchange for other securities more than 20 years ago, constitute an asset in the hands of the new Seaboard.

13. In failing to distinguish clearly between payment of claims and satisfaction of claims in equity, thereby applying a rule of equitable satisfaction to claims upon the original foreclosure sale, but requiring full payment of claims in the second and third sales of debtor's property.

14. In treating a reorganization plan in equity as though it were a reorganization plan under the Bankruptcy statutes, making it inflexible after the date of consummation and thereafter refusing distribution of any part of unex-

pected additional assets coming into the hands of the receivers to creditors not included in distribution of securities in the original plan of reorganization.

15. In holding that cash payment from additional assets, in part payment of previously unsatisfied bonds, will upset or disturb in any manner a plan of reorganization executed more than five years ago.

16. In affirming the order of the District Court, Order 451A.

REASONS FOR GRANTING THE WRIT

1. This petition to the Supreme Court represents the last opportunity that this Court, or any other, shall have to mitigate what time has proved was a monumental inequity in the reorganization of the Seaboard Air Line Railway Company. More than $100,000,000.00 in claims against the old Seaboard remain unsatisfied in any degree at this date. Yet since the consummation of the reorganization plan in 1946 and the issuance of cash and securities to creditors allowed to participate, more than $10,000,000.00 of additional assets have been passed to the new Seaboard without consideration or any further satisfaction of creditors; and Order 451A of the District Court, appealed from and affirmed by the Court of Appeals, transfers from the receivers an additional $6,000,000.00, the final fund that will ever be available for payment of unsatisfied creditors. This transfer is equally without consideration or any further satisfaction of unsatisfied creditors.

The senior unsatisfied claim is that of the general system mortgage known as the Adjustment mortgage, totaling some $5,000,000.00 principal and interest still outstanding and in the hands of the public. The majority of the outstanding bonds still in existence issued under that mortgage are held by Petitioner, whose 29 individual stockholders formed the Petitioner corporation to act in their behalf.

Petitioner has been unable to find another instance in any major reorganization of a carrier or public utility where a *bona fide* secured creditor was wholly excluded from participation in the new company, unless paid in cash. The exclusion of the Adjustment mortgage was explained on the ground that the prospective earnings available for fixed charges of the new Seaboard would be only about $7,000,000.00 annually, and could not support a capitalization broad enough to include this junior secured claim. Throughout the years representatives of the Adjustment claim have consistently asserted the position that the earning prediction was too low,[3] although an inactive Trustee forced the protection of the Adjustment mortgage claim upon individual bondholders. However justifiable the prediction of a $7,000,000.00 annual income might have been in 1945, the actual new Seaboard income has averaged $14,000,000.00 * * * twice the prediction, while the income of both old and new Seaboard over the ten years 1941-51 averaged more than $17,000,000.00. Comparatively junior creditors who thought they were surrendering their claims in return for stock with a predicted market value of 10 to 15 (58 F. Supp. 681, 60 F. Supp. 613) today find their stock at 65. Indeed they find themselves the owners of a $400,000,000.00 railroad rapidly paying out its mortgage debt; while their compatriot holders of Adjustment bonds, with a mortgage over the same original assets, have nothing. Nevertheless, to that company by the device of a bookkeeping "sale" Petitioner sees the last $6,000,000.00 of the debtor's assets pass, with no further satisfaction offered to creditors,[4] and in the very wake of a previous transfer of $10,000,000.00 under Order 442A.

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[3] See, *Guaranty Trust Co. v. Seaboard Air Line Ry. Co.*, 53 F. Supp. 672; *Badenhausen v. Guaranty Trust Co. of N. Y.*, 4 Cir., 145 F. (2d) 40; *Blackford v. Powell*, 4 Cir., 141 F. (2d) 302.

[4] For Judge Learned Hand's cogent evaluation of such "sales" see, *In re Lake's Laundry*, 2 Cir., 79 F. (2d) 326.

2. The result of the holding below is contrary to the rule established by this Court in the *Milwaukee case*:[5]

> "It is sufficient that each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the **equitable equivalent** of the rights surrendered. That requires a comparison of the new securities allotted to him with the old securities which he exchanges to determine whether the new are the equitable equivalent of the old. But that determination cannot be made by the use of any mathematical formula. Whether in a given case senior creditors have been made whole or received 'full compensatory treatment' rests in the informed judgment of the Commission and the District Court on consideration of all relevant facts. (318 U. S. 523, at p. 565. Emphasis supplied.)

On the original foreclosure sale, this rule was followed by the courts who saw to it that the "equitable equivalent" was furnished to each secured creditor for the claims surrendered. Securities were allotted on the basis of the earning value of the property covered by the mortgage, then when the face value of a claim was equalled by the par value of new securities allotted to it (with common stock at $100), that claim was considered satisfied for the purpose of passing to the next claim. (R. 123.) Because of the too-low capitalization, the Adjustment mortgage was not reached. Some 53% of the face value of the claim of the Refunding mortgage, immediately senior to the Adjustment mortgage and on the same properties, was satisfied. Its actual satisfaction for all purposes of equity, however, was complete, for the Refunding holders surrendered up their bonds to be "cancelled" and accepted the new se-

[5] *Group of Inst. Investors v. Chicago, M. St. P. & P. R. Co.*, 318 U. S. 523, 63 S. Ct. 727, 87 L. Ed. 959.

curities, even though they represented only 53% of their claim at par.[6]

Order 451A, however, contains no recognition of the equitable satisfaction of those claims which participated in the new securities. As in the case of Order 442A, the debtor's funds are to be passed in an apparently "legal" manner, for in legal contemplation the Reorganization Committee was the holder of the old bonds deposited with it by thousands of individual bondholders. The consideration in the "sale" is provided by the Reorganization Committee merely crediting against the face value of those old bonds the "purchase price" of the debtor's assets. (R. 26.) But to allow the Committee in an equity proceeding to "purchase" assets specifically reserved for the receivership (R. 188) by using bonds which have already been satisfied by receipt of their "equitable equivalent" in new securities, is to fly directly in the face of the rule of the *Milwaukee case.*[7] If a given claim was satisfied in the original sale and distribution of securities, so as to permit passing to the next claim in order of priority, then such claim is satisfied for all purposes in equity in this receivership. The reasoning of the Court below (R. 282, 285) that Petitioner cannot be offered any satisfaction because the Refunding mortgage immediately senior to the Adjustment mortgage has not been **paid** in full, simply does not meet the requirements of equity, nor the rule set out by this Court in the

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[6] On the consummation of the plan and issue and distribution of the new securities as provided in the plan, "the existing capital stock, mortgage bonds, notes and debentures of Subsidiaries affected by the plan * * * shall be relinquished and surrendered to the Reorganization Committee and cancelled and the respective mortgages or other evidences of indebtedness shall be released of record and cancelled." Plan of Reorganization. See also Deposit Agreement, Sec. 18 (R. 161).

[7] See also, *Ecker v. Western Pac. R. Corp.*, 318 U. S. 448, 63 S. Ct. 692, 87 L. Ed. 892; *Insurance Group Committee v. Denver & R. G. W. R. Co.*, 329 U. S. 607, 67 S. Ct. 583, 91 L. Ed. 931; *Northern Pacific R. Co. v. Boyd*, 228 U. S. 482, 33 S. Ct. 554, 57 L. Ed. 931; *Reconstruction Finance Corporation v. Denver & R. G. W. R. Co.*, 328 U. S. 495, 66 S. Ct. 1282, 1384, 90 L. Ed. 1400.

Milwaukee case. The mortgages ahead of the Refundings were not paid in full either; but they were "satisfied" with new securities and the Refunding mortgage was reached in the distribution. (R. 123-4.) The same rule must continue to apply on this third "sale" of assets, and some satisfaction be afforded to the Adjustment mortgage. If there remained any equity in the Refunding mortgage after the first sale, that equity was most certainly wiped out by its use in the "purchase" of $10,000,000.00 in assets under Order 442A. That equity is the only conceivable purchasing power which remained in the hands of the Reorganization Committee after the original foreclosure sale, when all the new Seaboard securities were issued and distributed.

This is an equity receivership. The decisions of the courts below treat this equity proceeding as though it were a plan under Chapter X of the Bankruptcy Act, or old Section 77, which became fixed and inflexible on the consummation date in 1946. In an equity receivership no creditor's right to participate is barred while there are assets to pay him. The reorganization proceeded in conformity with the *Milwaukee case* through the original foreclosure sale, and consummation of the plan; but on the second and third sales it departed therefrom, with the result that already-satisfied stockholders of the new Seaboard are to be unjustly enriched at the expense of fellow creditors of the old Seaboard. Some of these creditors may receive at least part satisfaction if the rule of the *Milwaukee case* is uniformly applied.

3. The result of the decisions below is to perpetuate an error of the past. Neither the District Court nor the Court of Appeals made recognition of the fact that the 1943 underestimate of the new Seaboard earnings and the resulting low capitalization worked a great inequity upon Petitioner and other unsatisfied creditors, although admitting

earnings "exceeded expectations". (R. 285.) Recognition of this inequity would necessarily require furnishing some sort of satisfaction to the Adjustment claim from present funds. Petitioner believes this Court, in its supervisory capacity, should give judicial recognition to that inequity. From an eighteen-page opinion the Court of Appeals quoted a one-sentence comment on this point,[8] although discussion of it comprised the great bulk of Petitioner's oral and printed argument.

4. The faith of the general public in bond issues of public companies, carriers, and utilities, requires that this issue be heard by the Supreme Court.

These bonds, first issued in 1909 to mature in 1949 with $25,000,000.00 eventually sold, and secured by the same properties securing the Refunding issue, are in a true sense representative of all bonds that may be caught up in reorganizations. Their elimination from participation in the new company was a very serious affair. Elimination from participation in an additional $16,000,000.00 of additional assets seems almost unjustifiable to the public holder. Stability of the very system of bond financing requires protection for the bond investor and payment from the security

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[8] "With regard to the contention that the present large System earning justified some recognition of the Adjustment 5's, it is sufficient to say that there is certainly no evidence before the court from which it can be found that the Adjustment 5's have a legal or equitable claim to any accumulated income as there is not a sufficient amount thereof to satisfy the claim of the Refunding 4's, and indeed no mortgage foreclosure proceeding asking impounding of income has been filed by the trustee of the Adjustment 5's." (R. 279) (53 F. Supp. 681).

As on several points in the opinion, the Court here adhered to the legal theory that the Refunding claim has a remaining unpaid cash value, without reference to its value in equity after its surrender in return for new securities. The free interchanging of the words "paid" and "satisfied" makes for obscurity throughout. (R. 285.) The comment concerning impounding of income is an aside, of course, and furnishes no illumination. The income of the old Seaboard has been impounded for all creditors by the Courts since 1930. Several of the mortgages which were satisfied in the plan were not foreclosed. The lien of the Adjustment mortgage is identical in all respects to the Refunding, being only immediately junior. (R. 104.)

available for satisfaction of the bond. All other secured claims in this reorganization, and in any reorganization of this type that Petitioner has found, have received some satisfaction or payment.

The holders of the Seaboard First & Consolidated Mortgage bonds, executed and first issued in 1915, and junior to the Adjustment mortgage, probably received more satisfaction out-of-proportion to the priority of their lien than any other creditors. While that mortgage was a first lien on only 408 miles of track, some $65,000,000.00 of the Refunding 4's were deposited as collateral with its Trustee. The result was that it claimed a larger portion of common stock of the new Seaboard than any other bond, yet the common stock has proved the most valuable issue because of the low capitalization of the new company.

It is difficult to reconcile the inequity which allows the Adjustment bondholder, standing between the Refunding holders and the First & Consolidated holders, to receive no stock, while they received some 56% of all common stock. Then he sees an additional $16,000,000.00 go to swell the value of that stock, while a small part of that would equitably satisfy his claim. This is the view of the matter which the public sees, and the public interest in the protection of investments is a compelling reason why the writ should be granted.

5. The interests of Adjustment bondholders and other creditors not permitted to participate in the original distribution of securities have not been adequately safeguarded in this reorganization. While millions of dollars were being spent in costs and fees, including the costs of various protective committees,[9] the Adjustment mortgage

[9] See the critical comment of the Interstate Commerce Commission concerning "excessive" fees and reorganization costs, 261 I. C. C. 723; and the lengthy opinion of the District Court on that matter, *Guaranty Trust Co. v. Seaboard Air Line Ry. Co.*, 68 F. Supp. 304.

trustee was inactive (R. 169) and various individual bondholders were forced to support the Adjustment claim, it having only sporadic representation.[10] This has worked a double inequity upon Petitioner, as evidenced by the comments of the Court of Appeals in its opinion below (R. 279); although the Court admitted its power in equity to remedy the situation. (R. 286.)

Petitioner believes that the courts below, motivated by an entirely earnest desire to see this lengthy litigation terminated, have erred in holding that to offer satisfaction to Petitioner in any form will "upset" or require modification of the plan of reorganization, and will delay its consummation. (R. 78, 80, 282.)

Petitioner has not asked to have any securities issued to Adjustment holders at this late date, or for any modification of the plan. The plan has, in fact, been executed for all practical purposes since 1946, when the securities were issued and the new Seaboard began operation. Few, if any, bondholders depositing late have demanded cash distributive shares, because of the higher value of the new securities since the beginning; and only $300,000.00 cash reserve has been set up to pay possible late dissenters. (R. 66.) There will be little or no actual distribution to any creditors, satisfied or unsatisfied. The transfer of $6,000,000.00 in assets to the new Seaboard is a bookkeeping transaction, whereby credits are charged back to old deposited bonds (R. 6.) There will be no new consideration passed by the new Seaboard, but merely a swelling of its treasury by $6,000,000.00. Under Order 442A, more than $10,000,000.00 has already been passed, with no distribution to creditors of any category (R. 250, 254).

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[10] The District Court gives a summary of the Adjustment 5's representation during the reorganization at 53 F. Supp. 672, 680. *Blackford v. Powell*, 4 Cir., 141 F. (2d) 302, was also an abortive attempt at appeal by individual holders.

Because of the apparent stigma borne by any who proposed modification of the plan, on this occasion the Petitioner offered several simple methods whereby the Adjustment claim may be partly satisfied by a cash payment to holders, in a proportion similar to cash distributive shares offered to holders of similar liens. (R. 282.) Such payment from the cash fund transferred can affect in no way the plan, which has long since been executed. It cannot be said that those who participated in the securities issued under the plan relied upon the additional $10,000,000.00 and $6,000,000.00 funds from the receivership, which did not come into the receivers' hands until 1947 and 1950.[11] The Respondents did not even work out the new distributive shares based on these funds until after the "sale" under Order 451 (R. 67); and little, if any, of the small fund reserved for dissenters will ever be paid out. (R. 67.)

The new Seaboard has specifically contracted with the reorganization committee to pay any part of the purchase price of the $6,000,000.00 fund "not payable by the use of deposited bonds" (R. 5, 30), and provision for satisfaction of the Adjustment 5's will not delay the closing of the receivership, nor affect distribution of remaining securities to late depositers who may come in.

In a record as voluminous as that of this railroad reorganization, it is all too easy to find justification for the elimination of individual claims. Where the representation of a claim has not been continuous throughout, the omission of many protective procedural steps is unavoidable. Following execution of the plan of reorganization in 1946,

[11] An important feature of both receivers' applications 442 and 451 is the admission in each that the new assets there dealt with had "not heretofore been sold or disposed of, and which under the provisions of paragraph 18.14 of the Final Decree is to be dealt with as the Courts may direct." (Application 442, par. II; Application 451, Introd. par.) (R. 237, R. 10.)

all protective representation for minority creditors apparrently disappeared.

In the present litigation concerning Order 451A, Petitioner found itself an outsider, being required to prove that receivership funds should not go to previously satisfied creditors. The burden should have been upon the new Seaboard, which was the "purchaser", to prove its right to receive the large fund from the receivers while paying no new consideration, nor making further satisfaction to creditors.

In such circumstances, Petitioner believes it all the more incumbent upon the courts that they exercise their admitted powers in equity to safeguard the interests of minority creditors, and that this Court should exercise its supervisory power to that end.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 8, 1951.

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IN THE

Supreme Court of the United States

No. 413

BONDHOLDERS, INC.,

Petitioner,

vs.

LEGH R. POWELL, JR. and HENRY W. ANDERSON, as Receivers of SEABOARD AIR LINE RAILWAY COMPANY, and SEABOARD AIR LINE RAILROAD COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

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INDEX.

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
Preliminary Statement	3
Previous adjudications of the status of the Adjustment Bonds	7
The status of the Petitioner and of the Adjustment Bonds held by it	10
Statements and contentions of the Petitioner	11
ARGUMENT	14
The petition does not present any basis for granting certiorari	14
There is no merit in Petitioner's contentions	14
CONCLUSION	16

Table of Cases and Authorities Cited.

Cases.

	PAGE
Badenhausen v. *Guaranty Trust Company of New York,* 145 F. 2d 40 (1944), 323 U. S. 797 (1945)	8
Badenhausen v. *Glazebrook,* 148 F. 2d 450 (1945), 326 U. S. 733 (1945)	8
Blackford v. *Powell,* 151 F. 2d 392 (1945), 327 U. S. 778 (1946)	9, 10
Bondholders, Inc. v. *Powell,* 190 F. 2d 74 (1951)	2, 13
Guaranty Trust Company of New York v. *Seaboard Air Line Railway Company,* 53 F. Supp. 672 (1943)	8
Guaranty Trust Co. v. *Seaboard Air Line Railway Co.,* 60 F. Supp. 607 (1945)	13
Seaboard Air Line Railway Receivership, 261 I. C. C. 732 (1946)	6

Other Authorities.

36 *Amer. Jur. Mortgages,* Sections 287 *et seq.*	12

IN THE

Supreme Court of the United States

No. 413

BONDHOLDERS, INC.,

Petitioner,

vs.

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BRIEF OF RESPONDENTS IN OPPOSITION.

Opinions Below.

There was no reported opinion by the District Court. The order of the District Court which the Petitioner sought to have reversed by the Court of Appeals for the Fourth Circuit was an order numbered Order No. 451 A, filed October 26, 1950 (R. 1) in the constituent and consolidated proceedings in which receivers (hereinafter called the Seaboard Receivers) had been appointed for Seaboard Air Line Railway Company (hereinafter called the Old Company).

Order No. 451 A is entitled and was entered in both the United States District Court for the Eastern District of Virginia and in the United States District Court for the Southern District of Florida (the ancillary receivership Court), in which those proceedings (hereinafter referred to as the receivership proceedings) were pending (R. 1-10).

The appeal to the Court of Appeals for the Fourth Circuit was from Order No. 451 A as entered in the United States District Court for the Eastern District of Virginia (hereinafter called the Virginia Court) (R. 275). Although there was no opinion by the Virginia Court, except Order No. 451 A itself, the views of the Virginia Court with respect to the contentions of the Petitioner are set forth in the transcript of the proceedings before that Court, upon which Order No. 451 A was entered (R. 54-81).

The Opinion of the Court of Appeals for the Fourth Circuit (R. 275) is reported as *Bondholders, Inc.* v. *Powell, et al.,* 190 F. 2d 74 (June 1, 1951).

Jurisdiction.

Petitioner seeks to have the judgment of the Court of Appeals for the Fourth Circuit reviewed by this Court by writ of certiorari pursuant to 28 U. S. C. 1254 (1).

Questions Presented.

None of the "Questions Presented", as stated in the Petition for Writ of Certiorari (P. 2), is in fact involved in these proceedings, as will appear from our statement of the case. Even if those questions, or any of them, were involved, they would form no basis for granting the Petition.

The only question here presented is whether the Virginia Court, in entering Order No. 451 A providing

for the sale of certain property remaining in the hands of the Seaboard Receivers (consisting largely of refunds of Federal income taxes for prior years when the railroad was operated by the Seaboard Receivers) and the distribution of the proceeds of such sale was proceeding in accordance with the legal and equitable rights of the bondholders of the Old Company and with the earlier decisions in the receivership proceedings. The Respondents will show that that question must be answered in the affirmative and that, in any event, nothing is presented that warrants a review by this Court.

STATEMENT OF THE CASE.

Preliminary Statement.

The Seaboard reorganization was carried out through receivership proceedings in equity. A Reorganization Plan (R. 139) providing for the distribution of new securities among the holders of a large number of different bond issues was approved by the Reorganization Courts (the Virginia Court and the United States District Court for the Southern District of Florida) in 1943 (R. 129). That Plan excluded the Adjustment Mortgage 5% Bonds due October 1, 1949 of the Old Company (hereinafter called the Adjustment Bonds), and the stock of the Old Company. The Adjustment Bonds were secured by a lien on all the property subject to the Seaboard Air Line Railway Refunding Mortgage (hereinafter called the Refunding Mortgage), junior to the lien of the Refunding Mortgage, but were not secured by any other lien.

A Final Decree of Foreclosure and Sale (hereinafter called the Final Decree) was entered in the receivership proceedings in 1945 (R. 164). It directed the sale of all the property of the Old Company (with certain exceptions) and

the distribution of the proceeds of sale among the bonds secured by mortgage liens on the property sold (R. 183). The Final Decree found that all the property sold was subject to the lien of one or more of the mortgages (R. 179). The mortgagees under all of the mortgages foreclosed by the Final Decree (other than the Adjustment Mortgage) had impounded the income from the respective mortgaged properties (R. 120-121). There were no proceedings for foreclosure of the Adjustment Mortgage and no order impounding income in its favor was taken by the mortgagee. Decrees *pro confesso* were taken against the Trustee under the Adjustment Mortgage (R. 169-173).

The total claim of the bonds outstanding under the Refunding Mortgage (hereinafter called the Refunding Bonds) at the date of the Final Decree was approximately $168,000,000 (R. 182). The amount allocated to the Refunding Bonds (including such pledged bonds) out of the proceeds of the sale pursuant to the Final Decree was about $21,500,000, leaving a deficiency of more than $146,000,000.

The major exceptions from the property sold pursuant to the Final Decree were (a) earnings of the property between the date of sale and the date of delivery to the purchaser (R. 188-191) and (b) certain claims for refund of taxes (R. 195). The earnings were excluded because of income tax problems in connection therewith. The tax claims were excluded because of doubt whether they could be effectively assigned.

In 1947 (after the consummation of the reorganization) the Reorganization Courts entered Order No. 442 A (R. 258), which provided for the sale of property in the hands of the Seaboard Receivers representing earnings from the operation by the Seaboard Receivers of the property sold pursuant to the Final Decree between the date of sale and the date of delivery. The proceeds of that sale were approxi-

mately $10,000,000, and Order No. 442 A directed that those proceeds be distributed among the bonds secured by the foreclosed mortgages in the same proportions as the proceeds of sale of the property sold pursuant to the Final Decree (Par. 7, R. 254). No appeal was taken from Order No. 442 A and it is now *res judicata*. The Petition discusses it as if it were still open to attack. There is no difference between the questions decided by Order No. 442 A and the questions decided by Order No. 451 A, which is the subject of this litigation.

Order No. 451 A (to which the Petition relates) disposed of property representing proceeds of tax refund claims amounting to about $6,000,000. The purchase price of that property was ordered distributed among the bonds secured by the foreclosed mortgages in the same proportions as the proceeds of sale of the property sold pursuant to the Final Decree and to Order No. 442 A (Par. 9, R. 6).

The total amount distributable to the Refunding Bonds out of the proceeds of sale of the property sold pursuant to the Final Decree and the property sold pursuant to Orders Nos. 442 A and 451 A was only about $28,000,000 (or about $330 per $1,000 bond), as against a claim of more than $168,000,000.

All of the property sold pursuant to the Final Decree and to Orders Nos. 442 A and 451 A was purchased by the Reorganization Committee, and by it transferred to the New Company pursuant to the Reorganization Agreement referred to below.

The reorganization was consummated in 1946. Under the Reorganization Plan bonds and stocks were allotted to the Refunding Bonds. The total face amount of the securities so allotted (taking common stock without par value at $100 per share) was $90,000,000 less than the aggre-

gate claim of the Refunding Bonds.* In spite of the "unexpected earnings" stressed in the Petition, the preferred and common stock allocated to the Refunding Bonds has never sold as high as $100 per share, so that the market value of the securities allotted to them was less than their claim by an amount substantially in excess of $90,000,000.

The bonds of the various issues deposited under the Reorganization Plan were deposited with the Reorganization Committee appointed by the Courts under a Deposit Agreement which provided (R. 159):

> "All Deposited Securities shall remain in full force and effect for all purposes, and shall not be deemed to have been merged, satisfied, released or discharged, and no right or lien shall be deemed released or waived in respect of any such securities, and any judgment upon any claims (including claims and judgments for deficiencies), and all liens and equities, shall remain unimpaired and may be enforced by the Committee and its successors or assigns until paid or satisfied in full, or expressly released * * *."

Accordingly, the Deposited Securities were entitled to receive any additional property to which they might become entitled subsequent to the first sale under foreclosure. The Reorganization Agreement between the Reorganization Committee and the New Company, dated May 25, 1945, specifically obligated the Reorganization Committee to bid, using the Deposited Securities, not only for the property

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* The figure of $90,000,000 is based on Appendix E to the order of the Interstate Commerce Commission in Finance Docket No. 14,500 approving the issue of securities pursuant to the Reorganization Plan, *Seaboard Air Line Railway Company Receivership*, 261 I. C. C. 689, 732 (1946). The total principal amount of Refunding Bonds dealt with under the Reorganization Plan was $85,265,000, including Refunding Bonds pledged under another mortgage which were treated in the same way as Refunding Bonds not so pledged.

offered for sale pursuant to the Final Decree but also for any property " • • • which may be offered for sale at any sale pursuant to any supplemental or other decree which may hereafter be entered providing for the sale of such property" (R. 200). In consideration of that obligation and of the further agreement of the Reorganization Committee to transfer or cause to be transferred to the New Company all of the property acquired at such sales, the New Company agreed to issue to the Reorganization Committee, or as it might direct, all of the securities of the New Company issuable in accordance with the Plan (R. 200), which were distributed to depositors.

This proceeding arose upon the "Answer and Objection to Application No. 451" (R. 50), filed by counsel on behalf of Bondholders, Inc., a South Carolina corporation, as the owner and holder of certain of the Adjustment Bonds (R. 50). Bondholders, Inc., is attempting to relitigate the question of the status of the Adjustment Bonds in relation to the other bond issues dealt with in the reorganization. That question has already been conclusively settled against the contentions of the Adjustment Bonds.

Previous Adjudications of the Status of the Adjustment Bonds.

The Adjustment Bonds were judicially determined to have no value, and not to be entitled to participate in the Reorganization Plan, in the three proceedings referred to below, in each of which certiorari has been denied by this Court. There were two general appeals from the order approving the Reorganization Plan in which the status of the Adjustment Bonds was adjudicated, and a separate proceeding on behalf of the Adjustment Bonds alone.

The Reorganization Plan was approved by orders of the Reorganization Courts entered in December, 1943, in the receivership proceedings that had been pending since December 23, 1930 (R. 129-138, 141).

The Virginia Court, in approving the Reorganization Plan, handed down a carefully considered opinion, written by the same judge who signed Order No. 451 A, which is reported as *Guaranty Trust Company of New York* v. *Seaboard Air Line Railway Company, et al.,* 53 F. Supp. 672 (December 15, 1943), in which he held that the Adjustment Bonds had no value and were not entitled to participation in the Reorganization Plan (53 F. Supp. 672, at page 680).

The Reorganization Plan was attacked (although not by the holders of the Adjustment Bonds) in an appeal from the Virginia Court's order approving the Reorganization Plan, in which that order was affirmed in all respects with an opinion by the Fourth Circuit Court of Appeals reported as *Badenhausen* v. *Guaranty Trust Co. of New York,* 145 F. 2d 40 (August 2, 1944), and certiorari was denied by this Court on January 8, 1945 (*Badenhausen, et al.* v. *Guaranty Trust Company, et al.,* 323 U. S. 797).

A similar appeal had been taken in the Fifth Circuit from the order of the Florida Court approving and ratifying the Reorganization Plan. That order was likewise affirmed in all respects with an opinion by the Fifth Circuit Court of Appeals reported as *Badenhausen, et al.* v. *Glazebrook, et al.,* 148 F. 2d 450 (April 10, 1945), and certiorari was denied by this Court on October 8, 1945 (*Badenhausen, et al.* v. *Glazebrook, et al.,* 326 U. S. 733).

On February 9, 1945, one H. J. Blackford, as the holder of certain Adjustment Bonds, filed a petition in the Virginia Court, joined in by other holders of such bonds, alleging that some provision should have been made for the holders

of the Adjustment Bonds because of the alleged priority of the lien of the Adjustment Mortgage over the lien of the Consolidated Mortgage (one of the mortgages securing bonds participating in the Reorganization Plan), and also claiming the right to receive certain moneys paid to paying agents prior to the receivership.

The Virginia Court considered the Blackford petition on the merits, even though noting that it had been improperly filed, and found that the petitioner and other intervening holders of Adjustment Bonds were barred and concluded from relief (R. 196), "(a) by the previous proceedings, adjudications and decrees * * * impounding all income of Seaboard Air Line Railway Company and of the Receivers for the benefit of * * * various mortgages prior and paramount in lien to the lien of the Adjustment Mortgage; (b) by the decree of this Court dated December 10, 1943 * * * which adjudicated that the claims of holders of Adjustment Bonds have no value and are not entitled to participate in the distribution of capital securities or other assets of the new Company, or otherwise in the assets of the new Company or the earnings or income therefrom; and (c) by laches and delay in the assertion of the alleged rights claimed by them."

An appeal from the order denying and dismissing the Blackford petition was taken to the Court of Appeals for the Fourth Circuit where that order was affirmed in a *per curiam* opinion reported as *Blackford* v. *Powell,* 151 F. 2d 392 (October 11, 1945), and certiorari was denied by this Court on February 4, 1946 (*Blackford* v. *Powell,* 327 U. S. 778). In the Petition for Certiorari herein, no mention is made of the fact that certiorari was denied by this Court, although the case is referred to in a footnote on page 12 and in another footnote on page 18. In each

case (and in the index) the citation is erroneously given as 141 F. 2d 302.

In the *per curiam* opinion of the Fourth Circuit Court of Appeals in the *Blackford* case it is said (151 F. 2d 392, at page 395):

> "The conclusive answer to the appeal, however, is the patent fact that it is an attempt to set aside the plan of reorganization formulated after years of careful investigation and approved by the District Court and by this court on appeal. No satisfactory excuse or explanation for so extraordinary an effort has been or can be made."

These proceedings and the Petition for Certiorari herein are a belated renewal of the same attempt.

The Status of the Petitioner and of the Adjustment Bonds Held by it.

At the hearing before the Virginia Court upon the entry of Order No. 451 A it was brought out by questions from the court that this Petitioner, Bondholders, Inc., was incorporated in the year 1950 (R. 74) and that it acquired its Adjustment Bonds in that year (R. 73), at which the court asked counsel for the Petitioner if he was serious in what he was asking (R. 73). The question was very natural, for five years earlier, on October 11, 1945, the Court of Appeals for the Fourth Circuit, with respect to the Adjustment Bonds involved in the *Blackford* appeal, had said (151 F. 2d 392, at p. 395):

> "Appellant Blackford's bonds were acquired on December 19, 1944, after the decision of this court, and Simpson's bonds were acquired by him partly before and partly after the Decree of the District Court on December 10, 1943, and none of the appel-

lants or other holders of the bonds took any action against the plan after that decree until February 9, 1945 when the petition now under consideration was filed. The laches of the appellants has been so gross that they are entitled to no further consideration by the Court."

Statements and Contentions of the Petitioner.

It would be impracticable, within a reasonable compass, to analyze and answer in detail all of the statements and contentions of the Petitioner that are unsupportable and erroneous, and upon which its claim is based, but we are compelled to mention certain of them in this restatement of the facts. The effort of the Petitioner to reopen the reorganization on the ground that there have been "unexpected earnings" (Pet. 2) is without merit, and needs no elaboration. If subsequent earnings, whether larger or smaller than those anticipated, could equitably require or justify the reopening of railroad reorganizations more than five years after they have been consummated, no reorganization would ever come to an end. Moreover, as pointed out above, the "unexpected earnings" have not been large enough to make the securities of the New Company worth enough to satisfy fully the claims of the bonds senior to the Adjustment Bonds.

The petition refers several times to Order No. 442 A, which was the order entered in 1947 covering the sale of the proceeds of the earnings of the property between the sale date and the delivery date (see p. 4, above) as if that order were still open to attack. No appeal was taken from that order and, as stated above, it has now become *res adjudicata*. The $10,000,000 proceeds of the property sold pursuant to that order are not involved in any way in the current proceeding. The Adjustment Bonds never had and

never could have any interest in that property, since neither the Trustee under the Adjustment Mortgage nor any holders of the Adjustment Bonds ever instituted any proceedings to foreclose the mortgage or to establish any lien on income. It is well settled that a mortgage creates no lien on earnings or income until the mortgagee takes some effective action to take possession of such earnings and income, by impounding or otherwise. *36 Amer. Jur. Mortgage Secs. 287 et seq.* Even if an order impounding income had been secured, the Adjustment Bonds would still have had no interest in those earnings, since they were inadequate to satisfy the claims of the prior mortgages.

Petitioner repeats many times that all of the bonds dealt with in the Reorganization Plan have already been "equitably satisfied." We have shown that that is not true as to the Refunding Bonds (the issue next senior to the Adjustment Bonds), because even the face value of the new securities which holders of those bonds received under the Reorganization Plan was about $90,000,000 less than the amount of their claim. The Petition admits (p. 13) that the face value of new securities allotted to the Refunding Bonds was only about 53% of their claim. The same situation exists in respect of some of the other bond issues dealt with under the Reorganization Plan.

Apparently the Petitioner intends to argue that prior bond issues must be deemed to have been "equitably satisfied" because issues junior thereto received some securities. However, the Seaboard financial structure was such that each bond issue (except the Adjustment Bonds) was secured (a) by a first lien on certain property and, in some cases, (b) by a junior lien on other property and (c) by pledge of bonds issued under another mortgage. The allocations in the Plan were, in most cases, made in respect of the first lien property and in respect of the bonds so pledged, not in

respect of property on which a particular mortgage might have a junior lien (see *Bondholders, Inc.* v. *Powell,* 190 F. 2d 74, footnote 1, p. 79; R. 282).

In any event no claim of "equitable satisfaction" on the ground suggested can be made in respect of the Refunding Bonds, since no issue junior to the Refunding Bonds received any securities under the Plan.

Petitioner seeks to escape the conclusive bar to its contentions resulting from the large unsatisfied balance of the claim of the Refunding Bonds by taking the position that that claim no longer exists because the Refunding Bonds deposited under the Reorganization Plan have been cancelled. As we have pointed out on page 6 above, the deposited securities were not cancelled, but were specifically kept alive, and are entitled to share in the proceeds of sale of the mortgaged properties. The Reorganization Committee was obligated to use those deposited securities to acquire for the New Company the properties sold pursuant to Orders Nos. 442 A and 451 A (R. 201).

The statement on page 5 of the Petition, that the reservation of income after sale was because of the recognized inadequacy of the estimated future earnings and the distributions under the Reorganization Plan, is wholly without foundation. The Courts were fully aware of the scope and effect of that reservation, and it was specifically taken into account in the determination of the upset price under the Final Decree (See *Guaranty Trust Co.* v. *Seaboard Air Line Ry. Co.,* 60 F. Supp. 607, at page 616).

The $6,000,000 worth of property that was sold pursuant to Order No. 451 A consisted almost entirely of amounts allowed by the United States as refunds in respect of Federal Income and Excess Profits taxes referable to the years 1943 and 1944, prior to the sale under foreclosure (R. 11). The entire amount, therefore, represented refunds

in respect of income and earnings of the years 1943 and 1944, all of which had been impounded for the benefit of the mortgages senior to the Adjustment Mortgage. The Reorganization Courts were fully aware of the existence of the tax refund claims when the upset prices under the Final Decree were determined (R. 185).

ARGUMENT.

The Petition Does Not Present Any Basis for Granting Certiorari.

Even on the Petitioner's statement of the questions presented by the petition there is nothing in the petition to justify the issue of a writ of certiorari, because none of the questions stated is a question of public or general interest or raises any conflict with any of the decisions of this Court or of any Court of Appeals.

Moreover, as we have also pointed out above, the question of the right of the Adjustment Bonds to participate in the reorganization was conclusively and finally determined against them many years ago. Certainly a bondholder acquiring bonds in 1950 is in no position to try to reopen those decisions at this time.

There Is No Merit in Petitioner's Contentions.

As we have shown by our statement of facts above, there could be no merit in Petitioner's contentions even if the questions which Petitioner seeks to raise had not already been finally and conclusively determined.

Petitioner claims, in substance, that, because (as the Petitioner says) the Reorganization Plan has turned out

to have been unduly harsh in excluding the Adjustment Bonds, the holders of those bonds are entitled to have the Courts disregard the prior lien of the Refunding Bonds (and other senior issues) on the property sold pursuant to Order No. 451 A, and give that property to the Adjustment Bonds.

That argument would be a complete *non sequitur,* even if the premise were sound. Any inequity in the Reorganization Plan due to events after the consummation of the Reorganization Plan, even if it could be corrected in any way more than five years after consummation, could not be corrected by taking property from unsatisfied senior bond issues for the benefit of junior issues. Moreover, as our statement of facts clearly shows, the Reorganization Plan was not, when approved, and is not, even in the light of subsequent events, unfair in excluding the Adjustment Bonds.

The conclusive answer to the Petitioner's claim is that (a) the Refunding Bonds had a lien on the property sold pursuant to Order No. 451 A prior to any lien which the Adjustment Bonds could possibly have had thereon and (b) the Refunding Bonds have a large unsatisfied claim, even after applying thereon the proceeds of sale of said property.

It is respectfully submitted that both Order No. 442 A of March 28, 1947 (R. 385), which is now *res adjudicata,* and Order No. 451 A of October 20, 1950 (R. 1), which the Petitioner now seeks to have reviewed by this Court, were strictly in accordance with law, and with the orders and decrees of the Reorganization Courts and the decisions in respect thereto, and that Order No. 451 A involves no question which should be considered by this Court.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated, November 23, 1951.

Respectfully submitted,

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In the Supreme Court of the United States

No. 418.

October Term, 1951.

BONDHOLDERS, INC., Petitioner,

vs.

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